Ginko, Inc. d/b/a Silver Springs Nursing Center *and* New England Health Care Employees Union, District 1199, SEIU, AFL–CIO. Case 34–CA–6078

April 27, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, BROWNING, AND COHEN

On September 21, 1994, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

ORDER

The National Labor Relations Board orders that the Respondent, Ginko, Inc. d/b/a Silver Springs Nursing Center, Meriden, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Excluding the payroll and bookkeeper/accounts receivable clerks from the collective-bargaining unit found appropriate, without the agreement of the New England Health Care Employees Union, District 1199, SEIU, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the payroll and bookkeeper/accounts receivable clerks as part of the collective-bargaining unit found appropriate, and apply to these unit positions the terms of the collective-bargaining agreement covering the unit.

(b) Make the payroll and bookkeeper/accounts receivable clerks whole for any losses they may have incurred as a result of their unlawful exclusion from the bargaining unit and from the coverage of the collective-bargaining agreement. Specifically, the Respondent is ordered to pay any wage differential from the contract rate, including any cost-of-living increases, to be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Additionally, the Respondent is ordered to pay any pension or other benefits unlawfully withheld.[2]

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Meriden, Connecticut facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt, and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] The General Counsel asserts in his exceptions that certain extraordinary remedies are warranted in this case. The General Counsel seeks an order requiring the Respondent to cease and desist from committing the specific violations found and from violating the Act ''in any other manner''; to make whole both the Union and the unit employees for any losses they may have incurred as a result of the Respondent's unlawful actions; and to reimburse the Board and the Union for their litigation costs in pursuing this case. We find merit in the General Counsel's exceptions concerning the make-whole provision for unit employees. This is a standard remedy for the violations of the type involved herein, and we shall conform the judge's Order with this standard. See *United Technologies Corp*., 287 NLRB 198 (1987), 292 NLRB 248 (1989). In all other respects, we find no merit to the General Counsel's exceptions. However, Member Browning would require the Respondent to reimburse the Board and the Union for the costs incurred in the litigation of this case. Member Browning finds the Respondent's defenses to be frivolous. See *Tiidee Products*, 194 NLRB 1234 (1972).

[2] Any additional amounts necessary to make benefit funds whole shall be determined as set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT exclude the payroll clerk and the bookkeeper/accounts receivable clerk from the bargaining unit, without the agreement of New England

Health Care Employees Union, District 1199, SEIU, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the payroll clerk and the bookkeeper/accounts receivable clerk as part of the collective-bargaining unit listed below and we will apply to the payroll clerk and the bookkeeper/accounts receivable clerk the terms of the collective-bargaining agreement covering that unit:

> All full-time and regular part-time social service and recreation employees, office clerical employees, receptionists, the bookkeeper/accounts receivable clerk and the payroll clerk employed at the Meriden, Connecticut, facility, but excluding all other employees, guards, professional employees and supervisors as defined in the Act.

WE WILL make the payroll clerk and bookkeeper/-accounts receivable clerk whole, with interest, for any losses they may have incurred as a result of our unlawful exclusion of them from the bargaining unit and from the coverage of our contract with the Union.

GINKO, INC. D/B/A SILVER SPRINGS NURSING CENTER

John S. F. Gross, Esq., for the General Counsel.
Stuart Bochner, Esq., of South Orange, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On a charge filed on March 25, 1993, and thereafter amended, by New England Health Care Employees Union, District 1199, SEIU, AFL–CIO (the Union), against Ginko, Inc. d/b/a Silver Springs Nursing Center (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 34, issued a complaint dated June 4, 1993, alleging violations by Respondent of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Hartford, Connecticut, on September 21, 1993, at which the General Counsel and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the close of trial, Respondent argued orally and, thereafter, the General Counsel filed a brief which has been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business located in Meriden, Connecticut, is engaged as a health care institution in the operation of a nursing home, providing in patient medical and professional care services for the elderly and infirm. During the 12-month period ending May 31, 1993, Respondent, in the course and conduct of its business operations at Meriden, derived gross revenues in excess of $100,000 and purchased and received at the Meriden facility goods valued in excess of $5000, which were sent directly from points located outside the State of Connecticut. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent's owner, Michael Konig, purchased the Meriden nursing home on or about April 1, 1992. The nurses and the service and maintenance employees working at the facility were then, and they continue to be, represented for purposes of collective bargaining by the Union.

On a petition filed by the Union for an election in a residual unit of employees working at the nursing home, the Regional Director, in his Decision and Direction of Election dated December 2, 1992, contrary to Respondent, included the full-time receptionist, the payroll clerk, and the bookkeeper/accounts receivable clerk in a unit of social service and recreation employees and office clerical employees. Respondent had urged, at the representation proceeding, that those positions be excluded as confidential. Thereafter, following a Board-conducted election, the Union, on January 11, 1993, was certified.[1]

In the instant case, the General Counsel contends that, during the spring and summer of 1993, Respondent, in violation of Section 8(a)(5) of the Act, informed the Union that it was removing the positions of payroll clerk and bookkeeper/accounts receivable clerk from the bargaining unit; unilaterally consolidated those positions and removed them from the unit. Respondent urges that, in fact and in law, the General Counsel has failed to show a violation of the Act in these regards.

B. *Facts*[2]

Following certification, during the January through April 1993 period, Respondent and the Union met some five or six times in an effort to negotiate a contract covering the approximately 10 employees in the residual unit. Prior to one of the negotiating sessions, in March or April, the Union's

[1] Case 34–RC–1125.

[2] The factfindings contained here are based on a composite of the documentary and testimonial evidence introduced at trial. The record is free of significant evidentiary conflict.

chief negotiator, Mary Ann Allen, met with Konig in an office at the union hall. According to Allen's uncontradicted and credited testimony, Konig told her that the Board incorrectly had placed the payroll clerk, and the bookkeeper/accounts receivable clerk, in the bargaining unit, and that he, Konig, was removing them from the unit, and he would hire someone to do those jobs who would not be in the unit. When Allen stated that she wanted the positions put back in the unit, Konig said that a person named Pat was being hired to take over those duties, that is, the payroll duties and, perhaps, some bookkeeping.

Later that evening, at the bargaining table, Allen raised this matter again. Konig stated that he was not going to have the payroll clerk position and the bookkeeper/accounts receivable clerk position in the bargaining unit. At this and subsequent meetings, Allen testified, she, on behalf of the Union, said that:

> [A]s far as we were concerned we wanted these positions in the bargaining unit and . . . we objected to them being taken out of the bargaining unit . . . we objected to the attempt of the employer to circumvent . . . the law. This group had been designated by the Labor Board to be within the bargaining unit and the employer decided that he was going to take them out of the bargaining unit.

Until mid-April 1993, when she left, the duties of the payroll clerk were performed by Eileen Schofield, who worked in the main office along with the bookkeeper/accounts receivable clerk, Linda Watkins. Prior to Schofield's departure, a number of her functions, such as collecting and tallying timecards, distributing paychecks, and writing certain checks, were performed, in her absence, by Watkins. Watkins' own duties, as bookkeeper/accounts receivable clerk, included taking a daily patient census, handling patient accounts, and handling money received for, and spent on, patient care.

Watkins, now Linda Hawley, testified that, when Schofield left Respondent's employ, the payroll duties were assigned to her, Watkins, by Respondent's administrator, David Pistrito, a statutory supervisor, to be performed in addition to Watkins' own regular functions. Later in the month, Pistrito told Watkins that an individual named Pat Dorman would be working in the office with her, at the desk formerly occupied by Schofield, learning to perform payroll duties and accounts receivable functions. Dorman's tenure however was brief. She left her job at the end of May or the beginning of June.

On Dorman's departure, the payroll duties were performed, for a short period of time, by the day receptionist, Gloria Castor. Thereafter, those duties were assigned to one Kim Bussard, an individual not in the bargaining unit, who, on July 5, 1993, had been appointed to the position of administrative assistant.[3] Bussard worked at the desk previously used by Schofield. At the end of August, Watkins resigned from her position.

During the course of contract negotiations, after the departure of Schofield, the Union asked that the payroll clerk position be posted, and Respondent refused. Also, the Union complained that part of Watkin's job functions had been taken away from her.

Pursuant to the prior agreement of the parties, when Respondent and the Union proved unable to agree on contractual terms, they submitted the matter to arbitration, and they began formal interest arbitration proceedings. The unit issues involved in this case were not presented to the arbitrator, whose award was received by the parties on September 3, 1993, retroactive to January 11, 1993. Indeed, the arbitrator set forth rates of pay for the payroll clerk position and for the bookkeeper/accounts receivable clerk position.[4] Also, the contract award contains a management-rights clause under which Respondent retained the right ''to determine the size and composition of the work force.''

On September 14, Allen met with Administrator Pistrito, who told her that Kim Bussard was performing both the payroll duties and some bookkeeping, and that both positions were out of the unit. Allen stated that both positions should be posted.

C. *Conclusions*

It is well established that an employer acts in violation of Section 8(a)(5) of the Act by unilaterally changing the composition of the bargaining unit, resulting in a loss of unit work.[5] Indeed, it is violative of Section 8(a)(5) to bargain to impasse concerning proposed alterations in the scope of the unit, a permissive subject of bargaining.[6] A union's waiver of its bargaining rights in these regards must be clear and unmistakable.[7]

Here, at or about the time that Schofield, the incumbent payroll clerk, left her employment, in April 1993, Respondent advised the Union that, as the Board had incorrectly placed the payroll clerk, and the bookkeeper/accounts receivable clerk, in the bargaining unit, Respondent was, unilaterally, removing those positions from the unit. Further, the Union was told that Respondent would hire a nonunit person to do those jobs. When the Union protested, Respondent stated that it simply would not have those positions in the unit.

About late April, Respondent hired an individual named Pat Dorman to perform the payroll duties and accounts receivable functions. Dorman however resigned a month or so later. By July 5, Kim Bussard, formerly the night receptionist, was designated the administrative assistant, and she left the bargaining unit. Bussard took over the payroll duties and, at least by the end of August, when Watkins resigned, bookkeeping functions. Shortly thereafter, Respondent advised the Union that Bussard was performing both the payroll job and some bookkeeping, and that both positions had been taken out of the unit. The Union protested to no avail.

I conclude that, by advising the Union, in March or April 1993, as it did, again, in September of that year, that, despite the Union's objections, it was, unilaterally, removing the positions of payroll clerk and bookkeeper/accounts receivable clerk from the bargaining unit, Respondent acted in derogation of its bargaining obligation. Respondent thus engaged in violations of Section 8(a)(5) of the Act.

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[3] At the time of certification, Bassard occupied the position of night receptionist, a unit position. She left the unit on her designation as administrative assistant, a nonunit position.

[4] During negotiations, Respondent's economic offers included pay rates for these jobs.

[5] *Suzy Curtains, Inc.*, 309 NLRB 1287 (1992).

[6] *Idaho Statesman*, 281 NLRB 272 (1986).

[7] *Kansas National Education Assn.*, 275 NLRB 638 (1985).

The record evidence further shows that, at least by early July 1993, Respondent, in fact, removed the payroll clerk position from the unit and assigned the work to a nonunit individual. At least by the end of August, when that individual took over bookkeeping functions, Respondent, in fact, removed the bookkeeper/accounts receivable clerk position from the unit, as it advised the Union. The positions were, effectively, consolidated, and the functions of both jobs are now performed by Bussard. By unilaterally consolidating those positions, and removing them from the unit, Respondent engaged in further violations of Section 8(a)(5) of the Act.[8]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[8] In reaching these conclusions, I reject Respondent's argument, made at trial, that, by virtue of its contractual right ''to determine the size and composition of the work force,'' as contained in the arbitrator's award received by the parties on September 3, 1993, Respondent had the right unilaterally to remove positions from the unit, as the Union clearly and unmistakably had waived its statutory rights in these regards. The contract language simply does not support the waiver argument. I also reject, as without foundation, Respondent's further contention that the Union was obligated to introduce this permissive subject of bargaining into the interest arbitration proceedings, or suffer a loss of its right to insist on maintenance of unit integrity.

CONCLUSIONS OF LAW

1. Ginko, Inc. d/b/a Silver Springs Nursing Center is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. New England Health Care Employees Union, District 1199, SEIU, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time social service and recreation employees, office clerical employees, receptionists, the bookkeeper/accounts receivable clerk, and the payroll clerk employed by Respondent at its Meriden, Connecticut facility, but excluding all other employees, guards, professional employees, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been, and is now, the exclusive representative of all employees in the aforesaid bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By informing the Union that it was removing the positions of payroll clerk and bookkeeper/accounts receivable clerk from the bargaining unit, and by, unilaterally, consolidating those positions and removing them from the unit, Respondent refused to bargain in good faith with the Union, as exclusive representative of the bargaining unit employees, concerning rates of pay, wages, hours, and other terms and conditions of employment, and thereby engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]